ZINMA HOUSING DEVELOPMENT SDN BHD

v.

SOON KOW SIN

HIGH COURT MALAYA, JOHOR BAHRU
AZHAR MA'AH J
[ORIGINATING SUMMONS NO: 24-1865-2001]
3 OCTOBER 2002

LAND LAW: *Caveat - Removal of private caveat - Whether plaintiff an aggrieved party - Caveatable interest - Joint venture agreement - Undertaking by plaintiff to develop land and deliver units of completed houses to defendant - Caveat premised upon failure to deliver houses - Whether interest insufficient to support a caveat - Whether no valid reason for caveat to remain - National Land Code 1965, ss. 323(1), 326, 327*

By a joint venture agreement dated 28 December 1980, the plaintiff undertook to develop a piece of land belonging to the defendant ('the land'). It was a term of the agreement that the defendant would transfer ownership of the land to the plaintiff for the purpose of the development, and that the plaintiff, as consideration thereof, would allocate and transfer several units of the completed houses to the defendant. The term apart, the agreement also stipulated that the plaintiff would retransfer the land to the defendant should it fail to implement the intended development. Following the agreement, the defendant effected transfer of the land to the plaintiff. The plaintiff however failed to carry out the proposed development, with the result that the defendant filed a civil suit against the plaintiff and lodged a caveat against the land. This was the plaintiff's application to remove the said caveat.

Held:

[1] The plaintiff is the aggrieved party whose land or interest in land has been affected by the presence of the private caveat. This gives the plaintiff the necessary *locus standi* to institute the present proceedings to have the caveat removed. (p 1035 b)

[2] What the defendant had sought the private caveat to protect was his entitlement to a certain number of units of completed houses that arose under the joint venture agreement. Such right can properly be termed as contractual right which does not amount to an equitable or other interest sufficient to support a caveat under s. 323(1) National Land Code. (p 1036 e)

[3] The grievance of the defendant that the plaintiff had failed to deliver completed units of houses in the development project does not come within the purview of s. 323 National Land Code. The caveat should be removed forthwith. (p 1036 f)

[Application allowed.]

Case(s) referred to:

Eng Mee Yong & Ors v. V Letchumanan [1979] 2 MLJ 212 ***(refd)***

Hew Sook Ying v. Hiw Tin Hee [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 SC ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 2 CLJ 713 CA ***(refd)***

Murugappa Chettiar Lakshmanan v. Lee Teck Mook [1995] 1 CLJ 545 CA ***(refd)***

Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1970] 1 MLJ 145 HC ***(refd)***

Trans Summit Sdn Bhd v. Chin Nyook Lin [1994] 4 CLJ 445 ***(refd)***

Wong Kuan Tan v. Gambut Development Sdn Bhd [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441 FC ***(refd)***

Legislation referred to:

National Land Code, ss. 323(1), 326, 327(1)

For the plaintiff - WL Tang; M/s KC Yap & Partners
For the defendant - KB Rajah; M/s KB Rajah & Co

Reported by WA Sharif

JUDGMENT

Azhar Ma'ah J:

By this originating summons the plaintiff applies *inter alia* for the following order:

> (a) Kaveat Persendirian yang dimasukkan oleh defendan melalui Pers. 7257/ 2000 Jilid 2134, Folio 36 yang didaftarkan di Pejabat Pendaftar Tanah Johor Bahru pada 07.04.2000, jam 3.01 petang ke atas hartanah Plaintif yang dipegang di bawah H.S.(D) 124321, PTD 19115, Mukim Senai-Kulai Johor dibatalkan:

By way of background facts, the plaintiff is the registered owner of the land mentioned in prayer (a) above. On 7 April 2001 the defendant entered a private caveat on the said land for the reason stated in the surat akuan annexed to Borang 19B ie, permohonan untuk memasukkan kaveat persendirian. According to the surat akuan the plaintiff and the defendant on 28 December 1980 entered into a joint venture agreement for the plaintiff to develop a piece of land known as EMR 380 Lot 103 Mukim Senai-Kulai belonging to the defendant. It was

the term of the said agreement *inter alia* that the defendant would transfer ownership of the land to the plaintiff for the purpose of the said development. As consideration for the transfer the plaintiff was to allocate and transfer certain number of unit of completed houses to the defendant.

It was also a condition that should the plaintiff fail to carry out and implement the development the land in question was to be retransferred to the defendant.

Subsequently, in pursuance to the agreement the defendant effected transfer of the land to the plaintiff. The plaintiff however, failed to carry out or complete the project in spite of renegotiation and extension given to enable the plaintiff to fulfill its side of the obligation. Purportedly to protect his interest in the land the defendant lodged a caveat in the plaintiff's land which is now the subject matter of the present proceedings.

The Argument

It is submitted for the plaintiff that the present application is brought by the plaintiff as an aggrieved party pursuant to s. 327 of the National Land Code to have the caveat removed as provided under s. 326 of the same. As the land in question is registered in the name of the plaintiff there existed a *prima facie* evidence of the plaintiff's unfettered right to deal with the land as he pleases. As such the onus is on the defendant caveator to satisfy the court that there are sufficient grounds for the caveat to remain. The decision of Privy Council in *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212 was quoted to support this proposition.

To discharge the onus it is further submitted that the defendant has to prove a caveatable interest in the land in question, the existence of serious question to be tried and balance of convenience that lies in favour of the caveat remaining on the register pending the disposal of his suit. A plethora of local cases were cited to lend support to this argument.

Against the abovementioned requirement of proof it is further submitted that going by the surat akuan that supported the defendant's application to enter the caveat the defendant's claim against the plaintiff is not for any interest or title in the land but an action *in personam*. Following the decision of the Court of Appeal in *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 1 CLJ 545 it is submitted that the defendant had failed to satisfy the first requirement for the caveat to remain.

Counsel for the plaintiff argued further that although there had been previous agreements and consent orders made and entered between the parties that emanated from civil suits filed by the defendant none of them touched and concerned the land in question. As such the defendant had failed to demonstrate his caveatable interest in the land; therefore there is no valid reason for the caveat to remain.

A Supreme Court decision in *Hew Sook Ying v. Hiw Tin Hee* [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 was drawn to the court's attention. It was decided in that case *inter alia* that to establish a caveatable interest in land under s. 323(1) of the NLC, it is essential for the respondent caveator to have a claim filed within reasonable time for adjudication.

In response to the plaintiff's counsel's submission counsel for the defendant relies heavily on the issue of enforcement of the defendant's right under the joint venture agreement and submitted that the lodging of the said caveat was made to protect the defendant's residual right in the land that was the subject matter of the joint venture agreement. It is argued further that the defendant's residual rights still remain until the final accounts are taken under the original joint venture agreement.

It is further submitted that s. 323 of the NLC is not only intended to afford protection to person(s) claiming title to, or any registrable interest in land but also to a person claiming a right to title to or registrable interest in land. The onus is on the caveator to prove that he has good reason for the alleged claim that he has a registrable interest.

On the issue of balance of convenience it is submitted that it would be better for the *status quo* to be maintained as any disposal of the property in question by the plaintiff to a third party would prejudice and cause injustice to the defendant. The case of *Trans Summit Sdn Bhd v. Chin Nyook Lin* [1994] 4 CLJ 445 was cited to demonstrate that by reason of a pending civil action filed by the defendant the *status quo* should be maintained.

The Court's Decision

On the given facts of the case it would be useful to recall to mind the provision of the law that enables this application to be made. Section 327(1) of the Code provides as follows:

> Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

With the above provision in the background and against the exh. "LKBA" annexed to the supporting affidavit it is apparent that the plaintiff being the registered proprietor of the land in question has no difficulty in passing the test of s. 327(1). Certainly the plaintiff is the aggrieved party whose land or interest in the land has been affected by the presence of the defendant's private caveat in the land. That gives him the *locus standi* to institute the present proceedings to have the caveat removed. Following this stand of the court the only issue that now requires the determination by the court is whether the defendant was right in entering the caveat or whether the caveat could remain pending the disposal of the civil suit between them. There is a plethora of local cases that deal with this issue: In *Nanyang Development (1966) Sdn. Bhd. v. How Swee Poh* [1970] 1 MLJ 145 the Federal Court decided that the onus of proof in an application under s. 327 of the NLC is on the caveator and it is for the caveator to satisfy the court that it is just for the caveat to remain; the burden is on the caveator to satisfy the court that he has good grounds for his alleged claim that he has registrable interest in the land.

Then in *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 1 CLJ 545 the Court of Appeal held *inter alia* that in order to ascertain a caveat, a caveator must first pass through three stages:

(i) whether he has disclosed a caveatable interest in his application under s. 323(1) of the Code; (ii) if he has established a caveatable interest, then, whether the evidence produced in support of his claim discloses a serious question to be tried; and (iii) if both questions are resolved in the caveator's favour, then whether the balance of convenience or justice, lies in favour of the caveat remaining on the register pending the disposal of his suit. The same sentiment was reiterated in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 2 CLJ 713 by the same court.

In order to determine the interest of the caveator the grounds expressed in the application for the entry of the caveat has to be examined. If it appears that the grounds stated therein are insufficient in law to support a caveat, then the caveat must be removed without the necessity of going any further. In the instant case it is plain that the defendant claimed to have the right to lodge the caveat based on the joint venture agreement. Reiterating one of the terms of the joint venture agreement, it was agreed *inter alia* that the plaintiff was to transfer certain number of units of completed houses to the defendant in consideration for the defendant agreeing to transfer all his land to the plaintiff for the development. The defendant's grievances is that the plaintiff has failed to deliver the said units of completed houses as agreed. Hence, the caveat.

With this scenario as the backdrop it is highly germane to consider what the Federal Court had to say about "caveatable interest" in the context of s. 323 of the Code in *Wong Kuan Tan v. Gambut Development Sdn. Bhd.* [1984] 2 CLJ 26; ([1984] 1 CLJ (Rep) 441). At p. 29 (p. 445) a passage reads:

> Thus it is plain that the appellant claimed to have the right to lodge the caveat but based on cl. 4(a) of the deed of assignment. It is also plain that this was a contractual right applicable only when purchase price is not fully paid. But this alone cannot create a caveatable interest in the land. The contractual provision does not create an interest within the meaning of section 323 of the National Land Code. Interests which are protectable by caveat are only interests recognised by the Code. The contractual provision does not amount to an equitable or other interest sufficient to support a caveat. Section 323(1) of the National Land Code sets out the classes of persons who may lodge a private caveat. They are person or body claiming title to any alienated land, or claiming any registrable interest in any alienated land; or claiming any right to such title or interest. ... The words "any rights to such title or interest" may be wide enough to allow rights arising under a contract for registrable dealing to be protected by a caveat but they are not wide enough to cover mere personal right as distinguished from right relating to land.

From the grounds provided by the defendant in supporting his application to enter the caveat, it is extremely clear that what the defendant had sought the private caveat to protect was his entitlement to certain number of units of completed houses that arose under the joint venture agreement. Such right can properly be termed as contractual right which does not amount to an equitable or other interest sufficient to support a caveat under s. 323(1) of the Code.

For all the above reasons it is the view of this court that the grievance of the defendant that the plaintiff had failed to deliver completed units of houses in the development project does not come within the purview of s. 323 of the Code. Thus the caveat should be removed forthwith. Costs to the plaintiff.